

# Additional Burdens upon Street Railway Companies.

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## ARGUMENT

OF

THOMAS P. PROCTOR,

In Opposition to allowing Cities and Towns to impose Taxes for  
the Use of Streets by Private Corporations,

MADE BEFORE THE

Committee on Cities and the Committee on Taxation,

Of the Massachusetts Legislature, sitting jointly,

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## ARGUMENT OF THOMAS P. PROCTOR, Esq.

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MR. CHAIRMAN AND GENTLEMEN:—

There have been a great many bills presented here, some ten or fifteen petitions and four or five different bills; and as I am expected to substantially close for the remonstrants it will become necessary for me to refer to all the bills, for I have no knowledge which one approbates itself to you. Hence, I must speak upon the question broadly.

The old Commonwealth shows no partiality. It treats all its children alike, whether natural or created. John A. Andrew said to me the night before I went to the convention for his first nomination as governor, "You know I have very extreme views on various subjects, but if I am nominated for governor, and elected, I shall be governor of the whole Commonwealth and treat the conservatives as well as the radicals and hold my extreme views in check." But if there are any on this Committee or among the petitioners who have extreme views on this subject and so very extreme that they ask the Legislature to take money from the horse railroads and put it into the treasury of the city, however illegally, however much against a breach of faith, however much against public policy, however much against the harmony of the communities in which the companies exist, and to their detriment, then I say to such extreme men, "You stand in your own darkness; and my prayer is, that I may give you a little light."

Matthew Arnold told the defects of the Americans, but he said the defects of the Americans were not the greatest trouble — they did not know what their defects were, and from the fact that they did not know them they could not

correct them. But I hope that anybody who has any defects or extreme ideas on this subject will seek light and seek to correct them.

The only source of all this trouble is the yawning maw of the city of Boston. The Legislature, in its wisdom, has seen fit to limit the power of the city to tax its citizens. It could not trust the city government to tax the citizens unlimitedly ; and consequently certain persons look about to see how they can get some money, to see how they can cease to tax the taxpayers and through the horse railroads tax the passengers. They must bleed somebody and they choose to bleed the horse railroads to supply the vacancy in the yawning maw, and bleeding the horse railroads they bleed the passengers who ride upon their cars. It has been asked by one of your Committee not now present, "Will it make any change with the passengers if an additional charge is put upon the horse railroads?" I am amazed that such a question should be asked. Everybody knows that one half of the corporations are bankrupt to-day or paying no dividends, and if they are earning just enough to pay their expenses without enough to pay any dividends and they are paying, call it for form's sake, a hundred dollars, and you put on a charge of ten dollars more, where is the ten dollars coming from except out of the wages of the laborer or increased fares or lessened service or non-extensions or a saving from some source to pay that extra ten dollars? Does anybody on this Committee hesitate for one moment upon the question, that if you put on an additional charge it has got to come out of one of those five sources? You cannot turn a pint into a quart — not by the present laws of science.

Now, gentlemen, here is an attempt to bleed the corporations for various motives, and the first one is, the capitalist with his millions (who does not want to reside in Nahant) wants to keep his taxes low, and so he says, take what more is necessary out of some corporation where he does not happen to hold any stock. There may be another motive for this movement. It may be that a gentleman seeking



political preferment wishes to hold his sail and catch the breeze that will move him into power, and hence he is willing to come here and ask you to put this thing through and associate himself with the movement, with the idea of catching votes from the public; but I tell you that any man who does that will find that he has waked up the operatives of the horse railroad companies (who can hardly pay them their wages now) and he will wake up the passengers that ride on the horse-cars if you do anything that is going to result in affecting them, and he will wake up a storm which will turn the wind from this quarter into the other, and you will find these men who are seeking political preferment running from this movement like rats from a sinking ship. There may be other motives; there may be a man who thinks he has perfected a great invention and it seems to him like a delightful baby which he must nurse; he wants to push it in here (notwithstanding the policy of the old Commonwealth, that the system we have to-day is the best one, and the very one the city of London has), he wants to push it in here and revolutionize our whole system for the sake of having his invention tried, for the sake of having his nostrum put into practice, and it will turn out like Brown-Séquard's elixir, which lasted a few months and then disappeared, and the lymph of Dr. Koch. These theories that come up here are nine tenths of them like nostrums of that kind. Give them leave to go away and not trouble this body nor harass the communities where horse railroads exist.

Now, gentlemen, the stock in trade of this whole movement is based on three untruths. I cannot be complained of for calling them untruths, and I will not say the harder word because the advocates thereof may be honest in what they say, although I cannot understand it myself. We are told, in the first place, in this celebrated document, City Document 144,—and I wish more of its authors were here,—we are told that the corporations pay nothing for their right to lay the tracks in the streets. Now, gentlemen, I submit that nothing is farther from the truth than that. We have

from the Legislature corporate existence and we have authority to go to the board of aldermen for a location and then and there they grant it on a condition. What is it? That we shall plant our capital in the street, to remain forever, and in sixteen years, even if it succeeds, that capital is turned to dust, and there is not a corporation, a railroad corporation in the Commonwealth of Massachusetts that has not sunk its first capital that it put in for the rights which were given to them at the time, once, and sometimes twice and thrice. Tell me that burying the capital in the street as the consideration for a right is not paying anything! It is just as much as if it had been paid into the treasury of the Commonwealth; it is put into the street for the public good. The public has had the benefit of it, of every dollar in case of those corporations which have paid no dividends (which is nearly half of them), and the companies have changed their fare and reduced it to five cents.

There is no question about this; it is as plain as two and two is four. The money is paid out and gone forever from every corporation that is running to-day, and it is put where the Commonwealth told us to put it; it is gone, and it is a consideration, and a tremendous big one too. Then they mortgage their franchise and their road to get enough to equip it and to run their cars.

Now here is paid out say \$100,000 for the right to lay iron in the street, and, gentlemen, it may surprise you, but it is the truth, that the iron and sleepers in a street a month after they are laid will hardly pay the expense of taking them up. After they have been there a little while, certainly it will not, without the right—mark you the distinction—without the *right* to keep them there and run the road, that iron and those sleepers are not worth the money it costs to take them up. You put down \$100,000 in iron and sleepers to-day, and it is gone forever, and these gentlemen come in here and say we have no franchise right they are bound to respect, and if we have no right, we have nothing at all. The iron and rails without the right are valueless, although they cost \$100,000. If we have no right, then we have sunk



\$100,000 for nothing. At all events there is the consideration for the right that was given to us—we say legally given to us for a valid consideration; they say not.

Now, gentlemen, the second question; and I want you to bear this in mind carefully, because if I meet any child in the street, and I ask him: “Here is a horse railroad going through the streets which has never paid anything for the right of going through the streets; horse railroads in other countries are paying for it; they are *all* of them able to pay for it,—why should n’t this company do it?” the child will say, “Yes; if these three things that are stated are true.” If they were true, I would agree with him, but they are all false. I have just showed you how we pay our capital for the right to lay the tracks in the streets, and it is all gone and the public have the benefit of it—do not forget that, because it is the only argument and all they have to rely on in an equitable point of view. Now I say secondly, they say we do not pay as much as they do in other countries. I say that is equally untrue, and I propose to show it from the document itself. I hardly need to do it, for Mr. Whitney has demolished it as to foreign countries.

*Representative Kittredge.* Before you leave your first point, I want to ask you a question. I understood you to say that you pay \$100,000 for the right to lay your tracks upon the streets. What is the explanation of that statement?

*Mr. Proctor.* I pay it as a consideration for the right to lay them. I agree to plant so much money in the street if the Legislature grants me a charter and the board of aldermen will give me a right, and I would not give one cent for the right if it is not a permanent right. That capital buried in the streets, whether it be one sum or another; whatever they bury in the streets the public get the benefit of, and when we accept a location we agree to do that, and that is the consideration we pay for the grant that is given us.

*The Chairman.* That I understand; but you do not pay it for the right.

*Mr. Proctor.* I pay it for the grant of a location. I

call that payment for the right. I get a right; I give the money. It is a contract.

I was just saying, Mr. Quincy, before you came in, that the Document 144 does not state what is true, namely, that we pay nothing for our right. I say every horse railroad that pays for putting down its track and its sleepers in the street in pursuance of the agreement, which it makes when it accepts its location, buries so much money which is gone forever, and is the consideration for the right to put them there. That is the contract. They say, you are located there if you will put in money enough to make a track, and the public gets the benefit of it by your running your cars. That is the consideration. That money is gone forever; it never returns to anybody; however successful the corporation may be it is turned to dust in sixteen years, and in the case of more than half the corporations it is not only buried once but sometimes twice and thrice to keep the cars running.

Secondly, I say that this document does not represent the truth when it says that we do not pay as much as companies in other places.

*Representative Quincy.* What is this document that you speak of?

*Mr. Proctor.* City Document 144. The city of Buffalo is an illustration of what I was saying, but as to the impolicy of selling off anything of that kind at auction, first, they bid them off at thirty-six per cent. and they have, according to this report here, got but one payment, of \$340, and the next time it was sold it was bid off at eleven and three-quarters per cent. of the gross receipts and not a cent has been received for it. But it is universally the case that where this business is done in the streets there is an antagonism, — get all you can out of the people, on the one hand, and the people, all they can out of the horse railroad, on the other, and there is never a healthy, harmonious coöperation. It is best to have something like a happy coöperation or partnership.

Again, Chicago charges \$50 a car. Take 200 cars on a

road which runs through a sparsely settled district here, and that where they only make \$10,000, and we pay (in a tax, that the city of Chicago does not charge at all) \$10,000 for our road, which is no comparison to the roads in the city of Chicago. They do not begin to pay as much as we do.

Then again, Cincinnati charges \$4 a linear foot of the car, and they do not begin to pay as much as we do for the same rights which we get.

*Representative Quincy.* What do you mean by that? Don't they pay the local tax?

*Mr. Proctor.* No, sir.

*The Chairman.* Do you mean not as much as you do, or don't they pay a franchise tax?

*Mr. Proctor.* There is n't a franchise tax like that in Massachusetts in the world. The only thing that comes anywhere near it is in New York, and it is one and a half mills on the par value; on \$500,000 it would be \$750 for the year, which is not a tenth part as much as we pay. I asked George Fred Williams if there was any other tax like it, and he said no, and here is Brother Harding, with a zeal that does credit to his energy at least, could only find this New York tax; so I think you can rely upon that statement of facts as correct.

Cleveland, Ohio, charges \$10 a car, which is not a quarter of what we pay on our little road. Detroit charges nothing of any kind. Jersey City charges nothing — no revenue received; Kansas City the same; Milwaukee \$15 a car; 200 cars would be \$3,000; that is n't half as much as our franchise tax. Newark, N. J., on the same rate, would pay \$12,500, and that would not be nearly as much as we pay, taking in the things which are left out in New Jersey.

I asked Mr. Meyer when he was here commenting upon this document, and he said he had made no comparison between our roads here and these roads, taking all the elements into consideration; he had made no comparison on that basis. His statement is utterly worthless. Nobody's statement is of any value unless you take into consideration all these elements, and the strongest element is the shortness of the line and the compactness of the city on that line.

Then I come to the State of New York, and there is no comparison between that and Boston, considering the compactness of the city and the shortness of the line. They give them a line from the North River to the East River right through the thickly settled part of New York, and it is not a third of the distance we carry people paying five cents. The cost of running a horse railroad runs up to three quarters of all that is received. You take off some of those expenses and you magnify the profit immensely and of course you can pay a large income out of that, but with us the most of our roads are bankrupt and only four pay above 8 per cent.

*The Chairman.* You say you take away the permanence of that right from the railroads and they could not pay their debts. As I have understood it here, the claim on the part of the horse railroad men and representatives, and as I read the charters, they have n't any permanence of right.

*Mr. Proctor.* Who have n't any permanence of right?

*The Chairman.* The horse railroads, as I understand it. I understand that has been the burden of the complaint, that they have not any permanence of right, and you want it.

*Mr. Proctor.* The petitioners have put it that way, and I am taking them on their position. If their position be true, to wit, that we have not any permanent right, then the iron may be forced up at any minute; and if they order them to be taken up, the iron and sleepers would not pay for the cost of taking them up and fixing the streets; and if you take that out, the rest of the property will not pay the debts of any corporation, West End or any other.

*The Chairman.* Do I understand that you are going to put your rights on the ground that you have a permanent right?

*Mr. Proctor.* Of course I am; but before I get to the law I want to nail these three untruths, and show that we pay largely for the rights that are given us, and show that we are now paying all that the roads in other places pay,



when taking all the elements into consideration, short lines and thickly settled cities as against long lines and sparsely settled towns and all the questions of taxation that come in. If you could sit long enough to get all the facts, you would find that we are paying as much as anybody else; that the policy of forty years in old Massachusetts, when you will sift the matter to the bottom, is the best policy, and it is revolutionary, injurious, destructive revolution to change it; and thirdly, when they say that we are able to pay more, when they flippantly say here with a kind of cheerful assurance that they know all about it, that we can pay, they simply know no more about it than they do about watchmaking. They have not taken the trouble to look at the returns to the railroad commissioners, which show that more than half of them are totally unable, and I tell you from my knowledge of them—and I have had a hard knowledge for twenty-five years, and I ought to know something about it—I know they are not able to bear any more burdens than they are bearing to-day. They are giving the public, the people, enough, and I shall refer to it more particularly as to our road later.

Now, gentlemen, I come to another subject, and it is a little delicate. What do we find here? Gentlemen, excellent gentlemen, come up here and ask—what? These gentlemen come up here and ask the Legislature to put power into the city to take the money out of one corporation and put it into another. They ask that the city should be the judge in its own case. A city may have given to it power to regulate the use of a street. That is what has existed here before without limit or control, but never before in my experience or within my knowledge has anybody had the audacity to approach a Legislature in any State and ask to have a man or a city or a corporation given the power to determine how much money he shall take out of somebody else's pocket and put it into his own. Monstrous in the very simple statement of it, but how much more monstrous does it become when the very man who comes up here and asks to be one of the factors, with his associates, to take the money,



comes up here and says to you: "I want the power to take that money, and I am going to take all I can get, and I am going to deal with them just as I would with a tenant, and screw them up to the highest pitch."

I say that to make the city a judge is the most monstrous proposition I ever heard of, and how much more monstrous does it become when a man, manifesting the spirit which the leader of that body of the city government did manifest, comes and asks to have himself with his associates made the judge. Good heavens! on what times have we fallen? Have we lost the first principles of honesty, the first principles of propriety, the first principles of having any judge, whoever he may be—

*Representative Rosnosky.* Mr. Chairman, do I understand the gentleman to be alluding to the city document.

*Mr. Proctor.* Not at all: I am not alluding to that. I am alluding to the impropriety of making the city its own judge of how much it should take out of anybody's pocket and put into its own treasury, and then I state beyond that that it is improper to give the power to any board of aldermen who have manifested a prejudgment already. Still greater is the reason for caution and delay in crossing the lines which have been established from the time King John gave the Magna Charta to the people of the world. I have said nothing, remember, Mr. Chairman and gentlemen, in any way reflecting on any gentleman connected with any document. I commend their zeal as far as it went. The misfortune of it is that it went only so short a distance and produced a result which did not give the truth and the whole truth, so that it would not mislead. My criticism of it was simply that it has caused many people to believe that the three propositions were true, to wit, that we paid nothing whatever for our rights, that other people paid more, and that we were able to pay more, neither of which propositions is correct.

Now, gentlemen, I have called your attention to the question of making a man his own judge, and, as the next subject alluded to, I come to the question that most of the bills

that have been put in here have been put in without any appeal from that judgment, which only aggravates the monstrous proposition. And then, gentlemen, still another point — not only is there no appeal, but there is no limit to the spirit which may induce any body of the city to take as much money as they have a mind to, when it is necessary to build any new streets or carry through any new enterprise they want to, to say nothing of a junket.

*Representative* —. Mr. Chairman, Mr. Proctor thinks, then, that a bill which gave a right of appeal to some board, as, for instance, the railroad commissioners, which limited the amount to be charged by the city, with a guaranty to the stockholders of the corporation that they would receive their just due, — you think that would not be objectionable.

*Mr. Proctor.* I would not answer your question quite yes, but I would say that that proposition would be very many times better than those that have been presented, and I thank you for asking the question; and, gentlemen, there is still another most terrible proposition in here in this connection, that can only be known to a horse-railroad man, and it was drawn out by my questions to Mr. Harding. He says when this is passed, Mr. Whitney, for illustration, will be called up and asked, How much are you going to give for Washington Street? and the thing would all be done, — that is the practical way it would be done. He did not tell you, because he did not know, that right on that hangs the life or death of the West End road. Let any man charged with the power to put money in his own pocket, as I have said here, say to the West End Railroad, Give me \$100,000 for the use of the streets from the northern depots to the southern depots on Washington Street, or I cancel the whole of your locations, and do the same on Tremont Street, for a mile long on each, and West End has got to do whatever the government or the party having the power says, or be killed.

You might as well cut a man's throat and tell him he is alive as to cut a mile out of Tremont and Washington

streets, and take up the tracks of the railroad if it does not pay for it, because without it you cannot get from one end to the other. There is no communication between the two. Give a man that power and he can make that same proposition, and the company has got to pay just what the man says or it is dead; and is that the kind of power, gentlemen, you think it is safe to leave in the hands of anybody, of any man who is interested in behalf of the treasury into which he is going to pay the money?

Where you see a fire break out you know there is trouble there, but that is only one instance, when there are a dozen where the trouble does not break out, and you know, with your experience of life and city government, that there are ten or a hundred troubles of that kind, where money is undoubtedly used, that never come to the surface. It is only the exception that bursts out, and I say, take your St. Louis case, where there has been this \$210,000 misused, or improperly used, and before your ears have ceased to hear that, then comes Elmira up to the same kind of thing; and our own Boston has its five-hundred-dollar troubles. All these things every man knows, and it seems to me that every man must appreciate the folly of putting the subject of money into the hands of the city government or any branch of it; but if this revolutionary process is to go on at all, give it to some disinterested judicial body that the community can respect and the corporations can respect, and all would go infinitely better than it would if it were managed in the manner that is proposed. But the whole thing is wrong, as I shall show you.

Now, gentlemen, I have one other subject in this connection. I tell you this is but the entering wedge; this attempt to put into the hands of the city government the power to take money is all wrong, but it is only the entering wedge. It is started on the street railways; it will very soon start on steam railways. Why, gentlemen, there is a steam railway in the city of Boston that crosses the Chelsea bridge, and on the twenty-eighth of February it shut down its gates four hours out of eleven, and on an average it is shut

between two and three hours. Talk about horse-railroad cars, that are serving the public all the time, obstructing the streets. Steam railroads do it still more, where the public service of carrying freight requires it, and all you have got to do is to simply push this thing one step farther and you have extended it to all the corporations in the Commonwealth, and the impolicy of it is sure to drive all the capital out of the Commonwealth.

Now, gentlemen, we have been told here that the city should charge rent. The city has nothing whatever to rent. The abutters own the fee, the public own the use of the streets, and the municipal corporation, as such, has nothing whatever to rent. A lease made by the city would not be worth the paper that it was written on, for it has nothing to give. It cannot lease.

*Representative Kittredge.* What do you mean by the public?

*Mr. Proctor.* The people, every one in the Commonwealth, and the people in the West as well as the people in the East.

I will quote now, for your pleasure, *Hampshire v. Franklin*, 16 Mass. 84, where it is said, "It is not in the power of the Legislature to create a debt from one person to another, or from one corporation to another, without the consent, express or implied, of the party to be charged."

Gentlemen, I dismiss the subject of rent because it is, to my mind, too silly to be thought of. The only thing that the Legislature has power to do is to charge a consideration for the grant that it gives to the corporation. It first creates the corporation, and then from time to time the board of aldermen, representing the State, gives the location. They can charge then what the State requires them to, and that is the consideration for the grant. The only thing left for the Legislature where they can take anything out of the corporation is to tax it. They can, first, tax its property; and they can, second, tax its franchise.

*Representative Quincy.* Then, as I understand your position, it is that the board of aldermen are acting as the



agents of the Commonwealth and not as the representatives of the city in granting the location.

*Mr. Proctor.* They make a contract. There are two parties present. There is the horse railroad, on one hand; there is the State represented by the board of aldermen, on the other. The railroad asks for a location, the city grants it, the horse railroad accepts it, and that acceptance is an agreement that they will build the track—in other words, as I call it, bury their capital in the streets—and run their cars. That is a contract, and that contract must not be confused with the corporation contract which is made for its existence. When the Legislature grants a charter it gives existence to an artificial creature. That is one contract, you may call it. From day to day locations are granted, and every time a location is granted a contract is made; and you must not confuse the two.

*Representative Quincy.* But you say it will be a breach of contract to revoke the locations?

*Mr. Proctor.* I will give you the law on that:—

1. Neither the board of aldermen, when acting solely as municipal officers, nor the cities, have now any power to grant any street railway location or to require money to be paid into the city treasury for any street railway location. And I wish to read very briefly from the case of *Cambridge v. the Cambridge Railroad*, 10 Allen, 57. That was a case where Cambridge undertook to interfere with a horse railroad.

“Certainly no right or authority to exercise any supervision or control over the defendants, or to require them to conduct the operations of their road in any manner other than is deemed expedient or proper by the defendants, or to enforce any supposed agreement or condition, is vested in the mayor and aldermen, under the general powers and duties devolved on them by law as officers acting for the city. Nor is there any such right or authority vested in them by the acts incorporating the defendants. So far as they are instructed with any power in relation to the location and construction of the road, and other matters



connected with its use, these duties are specifically enumerated and defined, and they are to be performed by them, not as officers acting for or representing the city, but as a body of men on whom certain duties of a ministerial or quasi-judicial nature are by law devolved. These duties have no necessary or essential connection with those which they are called on to perform in their official capacity as a branch of the city government. They might have been imposed as well on any other body of men, if the Legislature had seen fit, although it was doubtless wise as a matter of convenience and expediency that they should be performed by those who, in their official connection with the city, would be more likely to discharge them without difficulty and to the advantage of the public. But we look in vain for any provision of law which authorizes them to act in behalf of the city, either in making any contracts with the defendants, or in enforcing, in their names or in their official capacity, any contract created by law, with the city or the public, under the acts incorporating the defendants. If the conditions on which the location of the road or any part of it was granted to the defendants can be properly regarded as a contract — a point not necessary now to determine — it was not one to which the mayor and aldermen were a party, or which they are capable of enforcing. They were merely agents in prescribing the terms of such location, with specific and limited powers, and possessing no power or authority beyond those enumerated, among which is not included that of maintaining an action to compel the defendants to comply either with the terms of their charter or the conditions on which they were permitted to construct their tracks through the streets of a city.”

That states the position of the board of aldermen exactly and there can be no question about it. And that law remains the same to-day. I will read a short extract now from *Brimmer v. Boston*, 102 Mass. 22.

“In laying out ways within the city of Boston, the board of aldermen have similar powers, and perform like duties, as are exercised and performed by the county commissioners

in the other counties of the State. General Statutes, chapter 43, section 77. In the exercise of these powers and performance of these duties, they act, not as officers or agents of the city, but as public officers, vested with quasi-judicial functions, and deriving their power from the sovereign authority. The board of aldermen and common council, in laying out and constructing ways, are not subject to the direction or control of the inhabitants of the city, but are an independent board of public officers, vested by law with the control of all matters within their jurisdiction, and performing duties imposed by general laws."

There are other cases cited on my brief, which I shall give you, establishing what the law is, beyond all question. I say : —

2. Neither the board of aldermen, when acting solely as municipal officers, nor the cities, have the power to revoke any street railway location merely for the purpose of making a new location in the same street or requiring money to be paid therefor into the city treasury.

3. The board of aldermen appointed by the Legislature to make locations for street railways (whether acting as individuals, or as trustees, or in a quasi-judicial capacity) have not now the power to require any money to be paid into the city treasury for any street railway location.

4. The board of aldermen appointed by the Legislature to designate street railway locations (whether acting in their capacity as individuals, or as trustees, or in a quasi-judicial capacity) have not the power to revoke a location merely for the purpose of making a new location in the same street or requiring money to be paid therefor into the city treasury.

5. The present power of the board of aldermen (in whatever capacity they act) to revoke a street railway location is limited to the present statute provisions, stating in what cases revocations may be made. They act under special provisions, and that case that I read covers it; but I shall come to it farther on.

6. The words now in the statute, "if, in their judgment, the interests of the people so require" (Public Statutes,

chapter 113, section 23), have been judicially defined to mean that the officers are to exercise the power "as, in their judgment, the weight of the public convenience in the use of the streets may require" (Medford, etc., *Railroad v. Somerville*, 111 Mass. 232, 235). You will see that their power to make any revocation is limited to what they think is for the public convenience in the *use* of the street, and not in taking money out of somebody's pocket and putting it in somebody else's pocket, or for any question of pecuniary consideration. You will find it running through the whole policy of the Commonwealth, — to leave the city to regulate the use, — the people concurrently using it, turning out, and all that sort of thing; but there is not an instance in the history of the Commonwealth where they have ever crossed that line and allowed the board of aldermen of a city to touch the question of money. And this, therefore, becomes very important in any bill you shall make here, that you shall see exactly where the line is drawn as to the present powers. The present power of revocation is limited, and the power is limited as to the use and the methods of use in the streets. Certainly the Legislature has reserved no power in this respect; and the board of aldermen is in the same position as a justice of the peace who has jurisdiction for \$100; and Brother Wilson — although he did not do it, and would not do it — made a writ, setting the *ad damnum* at \$1,000. And somebody said, "Why, your Court has n't got jurisdiction;" and he went in to amend it, and the Court said it had n't got jurisdiction enough to allow him to amend it, because he had ruled himself out of Court by saying \$1,000 instead of \$100. Now if a board of aldermen should undertake to come here and revoke a location, from any caprice it saw fit, it would be beyond its jurisdiction. Its jurisdiction is limited to the use of the street. It would be a most preposterous position if it were left in any other way.

*Representative Wilson.* You do not understand, do you, that if they should assign as a cause, that public convenience required it, no matter what their real intention was,

that their judicial finding that public necessity required it would be conclusive in the case?

*Mr. Proctor.* Their decision would be good for nothing unless, as a matter of fact, they kept within their jurisdiction; and I am ready to say that no board of aldermen can act on a question of this kind without my knowing on what ground they act. The mere general statement will not prevail. And I do not believe there is a board of aldermen in Massachusetts that would be dishonest enough to conceal its reason. Some of them certainly would state the reason; and the man who stated a reason outside of the statute provisions to-day pertaining to the use of the street would be an honest man, and that statement would annihilate the judgment, if it were not within that line as to the use of the street, if it were a mere caprice, or if it were that I should pay \$100 into the city treasury.

(On motion of Mr. Kittredge, the hearing was then adjourned to 2 P.M.)

The hearing was resumed at 2.40 P.M., Senator West presiding.

*Mr. Proctor.* On the subject which I was speaking upon, namely, the use of the street, to which the powers of the board of aldermen are confined in their revocations, I wish to say that 2 Pick. 549 shows that public convenience, as to whether a street shall be laid out, totally excludes money. This decision finds that where a street was laid out because some neighbor gave this town so many dollars for doing it, a *certiorari* brought it up to the Supreme Court, and the Supreme Court said it was illegally laid out because it was laid out on account of money and not on account of the public use of the street. The money element cannot enter into the subject of the use of a street, and the two things must be kept totally distinct. And that illustrates and applies to this subject of revocations as to the use of the street.

In the case of *Mayor v. The Second Avenue Railway*, 32 N. Y. 261, it was held that an ordinance imposing a license duty upon city cars for revenue purposes only —



that is, money in the treasury — is not an ordinance for police and internal government; that the imposition of a tax by such corporation upon a railroad company in derogation of its rights — meaning its franchise rights — for purposes of revenue merely is unlawful and void. And what I claim is that any bill that might be passed by this Legislature in derogation of the vested rights of these companies, for the sake of filling the treasury merely, would be illegal and void.

*Senator West.* Do you mean to say that the West End Railway could take up its tracks and put flat surface wheels upon its cars and haul them about the streets of the city?

*Mr. Proctor.* I can draw any kind of a team through the street if I do not obstruct it. A teamster who drives a team through the city does it for hire. There is one broad rule for the use of the street. There is no qualification of that. The only difference between a horse railroad and a teamster who carries for hire is simply the privilege of laying a track.

Now I come to the main question in the case: if the grant by the charter to the street railway, and the location and its acceptance, and its burying its capital in the street, never to return, amount to a contract or agreement or understanding that the location is to be permanent if the terms are complied with, then the Legislature cannot pass a law to impair that contract, agreement, or understanding. And while I am considering this I want you distinctly to remember that the granting of a right to exist, made in 1859, is one thing; a location made by a board of aldermen, representing the State, yesterday, is another thing. And when I am speaking of a contract right here, I am speaking of a contract right which is made when the location is made, between the corporation, preëxisting, on the one part, and the board of aldermen, representing the State, on the other. It is that latter contract which is vested and which cannot be interfered with. In *Crease v. Babcock*, 23 Pick. 234, Morton, J., says, "That a charter of incorporation is a contract between the government and the corporators is a prop-



osition which seems to be fully supported by the highest judicial authorities. That it is exempt from the ordinary action of legislative power, beyond the reservations, express or implied, contained in it, is equally well supported. In other words, the government can rightfully do nothing inconsistent with the fair meaning of the contract which it has made." Then, also, in *Commonwealth v. Essex Company*, 13 Gray, 253, Shaw, J., says:—

"The power of repeal is limited and qualified, and was so considered in the case of *Crease v. Babcock*, 23 Pick. 334.

"Does this come within the power of the Legislature to amend or alter? It seems to us that this power must have some limit, though it is difficult to define it. Suppose an authority has been given by law to a railroad corporation to purchase a lot of land for purposes connected with its business, and they purchased such a lot from a third party, could the Legislature prohibit the company from holding it? If so, in whom should it vest? or could the Legislature direct it to revest in the grantor, or escheat to the public, or how otherwise?

"Suppose a manufacturing company incorporated is authorized to erect a dam and flow a tract of meadow, and the owners claim gross damages, which are assessed and paid. Can the Legislature afterwards alter the act of incorporation so as to give to such meadow owners future annual damages?" These corporators have put their money in and have taken what was agreed to be given them for that money. The rights cannot be changed. The Court goes on: "Perhaps from these extreme cases—for extreme cases are allowable to test a legal principle—the rule to be extracted is this: That where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted." And the right that we claim here is this: On the first day of this year, say, our corporation had been existing thirty years. That corporation, so existing, on that day made a contract with the board of aldermen,

representing the State; that contract provided that if we accepted the location as they gave it, subject to the terms which they required, and we put our money into the track and sleepers and run our cars, we should have that right permanently. That is what the contract says. That is what everybody understands it means. And it is a vested right which cannot be disturbed.

*Representative Wilson.* Do you mean to say by that, Mr. Proctor, that, where a board of aldermen grants a location, that location cannot be wiped out by a discontinuance of the street?

*Mr. Proctor.* Thank you for coming to it. I have a minute here to come to it later, but I will put it in now as long as you have asked it. The Legislature, well knowing that streets would sometimes have to be discontinued where this right has become vested, has taken the precaution to put into the statute under which we take the locations that if a street is to be discontinued we shall not claim damages of the city for doing it. What did the Legislature put that into the statute for if they did not recognize our vested rights and wish to prevent us from getting damages when they did that? That is my answer to his question.

*Representative Kittredge.* Refer me to that section, will you?

*Mr. Proctor.* It is Public Statutes, chapter 113, section 31.

*Representative Kittredge.* Did these votes or writings which you define as a contract under these decisions, in the case of your railroad, use the words "permanent location"?

*Mr. Proctor.* I do not know that the word "permanent" exists anywhere except in the surrounding circumstances. It is a rule of law that where a grant is made without any limitation it is permanent.

*Representative Kittredge.* Then it is upon that construction in the case of a grant that you supply the word "permanent"?

*Mr. Proctor.* Yes, exactly. The Legislature frequently puts in a limitation of fifty or seventy years, but that is very

rare in this Commonwealth, because it is not politic, it is not in the best interests of the community. Stability, honor, and confidence between people bring the best result to the community and to everybody.

Now, gentlemen, I will read you next the most celebrated decision upon this subject within my knowledge, and, I think, the most celebrated in existence. You all remember the Broadway surface road and the boodle aldermen of New York. In consequence of so much boodle, the Legislature passed a law that the charter of that corporation should be ended. And it was ended. And they went right along and passed a law that the franchise which this Broadway Surface Corporation had in its possession should be taken and sold. And the people, by the attorney-general, brought a bill in equity against the receiver of that corporation — for, when a corporation is dead, there has to be a receiver to represent it — to have the Court decide whether that corporation, under the existing circumstances, had any vested rights. And if there ever was a case where a Court would decide that a corporation had not got a vested right, it would be that one. And yet the Court decided that that franchise belonged to the receiver, and that he should take it and sell it and pay the money over to the creditors of the corporation and, when they were paid, to the stockholders.

The Legislature tried, not only to annihilate the corporation, but to annihilate the right; and the Court decided that the Legislature was correct in annihilating the existence of the corporation, but that the attempt to annihilate the right which the corporation had was illegal and void, and that the right remained with the receiver, to keep and sell.

*Representative Kittredge.* Because it had a vested right?

*Mr. Proctor.* Because it had a vested right.

*Representative Kittredge.* Is that the Court of Appeals?

*Mr. Proctor.* Yes, sir; it is 111 N. Y. 1. I have only got a little of it here. It was a very long decision. The Court says: "A review of the judgment brings up for consideration propositions very grave in character, not only on account of the extent of the private interests affected, but

because their determination will affect great public questions arising out of the limitations imposed by the Constitution upon the legislative power over the property of corporations lawfully acquired.

"The statutes, upon which the action is predicated, confessedly assume the right and power of the Legislature to wrest from the company its franchises; to transfer them to other persons, and bestow their value upon the donees of the State. The statutes contemplate the absolute destruction of the property of the corporation, and the loss of its value to the creditors, who have made loans in good faith upon the security of such property, and this action is avowedly prosecuted to accomplish the purpose of the legislation. It is, therefore, urgently contended by the attorney-general that none of the franchises of the corporation survived its dissolution, and that the mortgages previously given thereon, as well as all contracts made with connecting street railroads for the mutual use of their respective roads, fell with the repeal and could not be enforced.

"If it could be supposed for a moment that this claim was reasonably supported by authority, or maintainable in logic or reason, it would give grave cause for alarm to all holders of corporate securities.

"The contention that securities representing a large part of the world's wealth are beyond the reach of the protection which the Constitution gives to property, and are subject to the arbitrary will of successive Legislatures, to sanction or destroy at their pleasure or discretion, is a proposition so repugnant to reason and justice, as well as the traditions of the Anglo-Saxon race, in respect to the security of rights of property, that there is little reason to suppose that it will ever receive the sanction of the judiciary, and we desire in unqualified terms to express our disapprobation of such a doctrine. Whatever might have been the intention of the Legislature or even of the framers of our Constitution in respect to the effect of the power of repeal reserved in acts of incorporation, upon the property rights of a corporation, such power must still be exercised in subjection to the provisions of the Federal Constitution.



"Considering the power which the State has to terminate the life of corporations organized under its laws, and the authority which its attorney-general has by suit to forfeit its franchises for misuse or abuse, and to regulate and restrain corporations in the exercise of their corporate powers, there is little danger to be apprehended in the future from the overgrowth of power, or the monopolistic tendencies of such organizations; but whatever that danger may be, it is trivial in comparison with the widespread loss and destruction which would follow a judicial determination, that the property invested in corporate securities was beyond the pale of the protection afforded by the fundamental law.

"It is not perhaps strange, in the great variety of cases bearing upon the subject, and the manifold aspects in which questions relating to corporate rights and property have been presented to the courts, that dicta, couched in general language, may be found giving color to the plaintiff's claim; but we think that there are no reported cases in which the judgment of the Court has ever taken the franchises or property of a corporation from its stockholders and creditors, through the exercise of the reserved power of amendment and repeal, or transferred it to other persons or corporations, without provisions made for compensation.

"Judge Comstock, in *Davis v. Mayor*, etc., said, 'As the consideration for the constructing the road, the ordinance clearly contemplates that it is to become the private property of the associates. They alone will be entitled to place their cars upon it, and within a maximum limit they can charge what they please for the carriage of passengers. These rights are in effect granted in perpetuity' " (because there is nothing to limit them).

"In the case of *Mayor, etc., v. Second Avenue Railroad Company* (32 N. Y. 272), it was said, 'Assuming that the common council had power to make the grant, then its acceptance by Pearsall and his associates, signified by the execution of the agreement with the conditions annexed thereto, and the duties and obligations, resulting therefrom, invested the latter with the right of property in the franchise which the common



council could not take away or impair by any subsequent act of its own.'

"When we consider the generality with which investments have been made in securities based upon corporate franchises throughout the whole country, the numerous laws adopted in the several States providing for their security and enjoyment, and the extent of litigation conducted in the various Courts, State and Federal, in which they have been upheld and enforced, there is no question but that, in view of legislatures, courts, and the public at large, certain corporate franchises have been uniformly regarded as indestructible by legislative authority, and as constituting property in the highest sense of the term.

"It is, however, earnestly contended for the State that such a franchise is a mere license or privilege enjoyable during the life of a grantee only" (you will notice that Brother Richardson speaks of it as a license in his opinion) "and revocable at the will of the State." (That is the position taken by the petitioner here: that it is something revocable by the State.) "We believe this proposition to be not only repugnant to justice and reason, but contrary to the uniform course of authority in this country. The laws of this State have made such interests taxable, inheritable, alienable, subject to levy and sale under execution, to condemnation under the exercise of the right of eminent domain, and invested them with the attributes of property generally." (And I might say here that our Legislature, in the Act of 1889, has expressly provided that the "franchise" of these same corporations should be mortgaged to secure loans, and similar authority has existed before and franchises have been mortgaged.)

"In *Mayor, etc., v. Second Avenue Railroad Company* (32 N. Y. 261), Judge Brown said: 'The rights of municipal corporations to property in lands and its usual incidents, and to create ferries and railroad franchises, are quite distinct and separate from their duties as legislatures having authority to pass ordinances for the control and government of persons and interests within the city limits. The latter are powers held in trust, as all legislative powers are, to be used and

exercised for the benefit and welfare of the whole community, while the former are property in the ordinary sense, to be acquired and conveyed in the same manner as natural persons acquire and transfer property.'

"The same learned judge said in *Brooklyn Central Railroad Company v. Brooklyn City Railroad Company*, 32 Barb. 364" (I beg you, gentlemen, to notice this, because it is exactly what I said here this morning): "'The grant to the City Railroad Company and its acceptance on the conditions annexed with the duties and obligations and large expenditures resulting therefrom, would seem, therefore, upon the principles I have endeavored to state, to invest the company with the right of property in the franchise, of which it cannot be deprived without its consent or against its will.'

"The case of *N. O. S. F. & Lake R. R. Co. v. Delamore*, 114 U. S. 501, is directly in point. There the franchise, as here, was acquired by the corporation from the municipal authorities of a city under general laws authorizing the formation of street railroad corporations. It was held, 'where there had been a judicial sale of railroad property under a mortgage, authorized by law, covering its franchises, it is now well-settled that the franchises necessary to the use and enjoyment of the railroad pass to the purchaser. It follows that if the franchises of a railroad corporation, essential to the use of its road, and other tangible property, can by law be mortgaged to secure its debts, the surrender of its property upon the bankruptcy of the company carries the franchises and they may be sold and pass to the purchaser at the bankruptcy sale.'

"The power to repeal the charter of a corporation cannot, upon any legal principle, include the power to repeal what is in its nature irrepealable, or to undo what has been lawfully done under power lawfully conferred. *Butler v. Palmer*, 1 Hill, 335." (So if power has been given to lay a track in a street, at large expense, in pursuance of a contract between two parties, the law recognizes the property in the right, and it cannot be destroyed.)

"Since the decision of the celebrated Trustees Dartmouth

*College v. Woodward*, 4 Wheat. 518, the doctrine that a grant of corporate powers by the sovereign, to an association of individuals, for public use, constitutes a contract, within the meaning of the Federal Constitution, prohibiting State Legislatures from passing laws impairing its obligations, has, although sometimes criticized, been uniformly acquiesced in by the Courts of the several States as the law of the land, and may be regarded as too firmly established to admit of question or dispute.

"If it is possible to conceive the idea of a repealable grant" (notice this language) "certainly such a grant, accompanied with power to convey or pledge the interest granted, must, on the execution of the power, necessarily preclude a resumption by the grantor of the subject of the grant, or any right of property acquired under it." (Right there, let me say, the moment that we comply with the terms of our contract and put our money into the street and run our cars, our property is as firmly fixed as any real estate we own. The Judge continues): "An express reservation by the Legislature of power to take away or destroy property lawfully acquired or created would necessarily violate the fundamental law, and it is equally clear that any legislation which authorizes such a result to be accomplished indirectly" (I beg you to notice this) "would be equally ineffectual and void." (The importance of this is that you cannot make a bill here that is of any value — and I want a good one, a square one, if any — unless you keep within the lines of what is established law.)

"In *Commonwealth v. Essex Co.*, 13 Gray, 239, Justice Shaw said: 'When, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted.'" (Now, if they want Massachusetts law, let them take that.)

"Judge Cooley says" (you will all know who he is, now head of the Inter-State Commerce Railroad Commission): "'It cannot be necessary at this day to enter upon a discussion in

denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure tyranny, and it has been forbidden in England ever since Magna Charta, and in this country always.'” (And we will be proud of our country. And the day when you disobey that rule you might well be ashamed of your country.)

*Representative Kittredge.* If not of ourselves.

*Mr. Proctor.* The Court continues: “It is immaterial in what way the property was lawfully acquired, whether by labor in the ordinary avocations of life, by gift or descent, or by making a profitable use of a franchise granted by the State” (and the profitable use of it is to bury our capital in the street and run cars as we agreed to), “it is enough that it has become private property, and it is thus protected by the law of the land.

“Judge Thompson said in *Dash v. Van Vleeck*, 7 John. 477: ‘It is repugnant to the first principles of justice, and the equal and permanent security of rights, to take by law the property of an individual without his consent and give it to another.’

“In *New York and Oswego Midland Railroad Company v. Van Horn*, 57 N. Y. 473, it was held that a legislative intent to violate the Constitution will not be assumed, nor will a law be so construed as to give it a retroactive effect when it is capable of any other construction; and that if all of its language can be satisfied by giving it prospective operation only that construction will be given to it.” (Why, I have heard one of the laymen on this Board here say — I do not now remember who it was — that the day never would come when he would vote to take away private property without compensation for it. And that layman, in my judgment, knows a great deal more law than a good many that have appeared before this Committee.)

*Representative Kittredge.* That is sound law.

*Representative Wilson.* You are not alluding to the legal profession on the Committee?



*Mr. Proctor.* Oh, no. I said "outside." The Court continues: "In the case of *Dash v. Van Vleeck* (supra), it was decided that it is a principle of universal jurisprudence that laws, civil and criminal, must be prospective, and cannot have a retroactive effect." (You see that is just what is proposed here, to revoke a grant made a long time ago, for the purpose of granting it over again and getting some money. We might almost cry out, "Venal Rome!") The Court says, in continuation: "And in *Benton v. Wickwire*, 54 N. Y. 229, the Court declared that neither original statutes nor amendments can have any retroactive effect.

"We, therefore, think this law is obnoxious to the objection, that it assumes to take property without due process of law, and impairs the obligation of contracts."

I consider this case, so recent and so comprehensive, conclusive upon this subject. And Massachusetts law is in accord with it.

I am not going to read this; I am only going to call your attention to a case (20 N. J. Equity, 66). It is to this effect: "The municipal government has power to discharge the company to whom permission to lay rails in the streets was granted, from the condition contained in the contract, and when once discharged, cannot again make the company subject to the condition." They have granted a right, subject to a condition. They have relieved the company of the burden of the condition of letting another company run over it; and then they undertake to put it on again, and the Court says, "No; when you took it off, they had an unconditional grant, and you cannot do anything to interfere with their rights in that unconditional grant."

A case was referred to here (101 U. S. 528) in Mr. Richardson's brief. He referred to it as one of the exceptions. Now, according to my view, it is no exception at all. It was a question of taxation and had nothing to do with a franchise grant; and, of course, the government have always the right to tax as much as they please, subject to the constitutional limitations. But the question of franchise grant is a totally different subject.

Now, if the Committee are not tired, I will read one page from 1 Dillon's *Municipal Corporations*, section 68, a note (p. 115, 4th ed.): "The extent and limits of legislative power over corporations and their rights and the rights of their mortgagees and of persons having contracts with the dissolved corporations underwent the most thorough and deliberate consideration of the Court of Appeals of New York in the *Broadway Surface Railway case*, *People v. O'Brien, Receiver, etc.*, 111 N. Y. 1 (1888)." . . . "The Court held that the franchise of the corporation, under its charter, and the grants from the municipal authorities to lay down tracks and operate its railroad was a property right which survived the dissolution of the corporation; so were the rights of the corporation under its contract with connecting railroads, and also the rights of the mortgagees to the continued use of the street in connection with the railroad, under the municipal consent to the use thereof for railway purposes. The special provisions of the repealing act as to winding up the affairs of the dissolved corporation and disposing of and distributing its property were held to be unconstitutional."

And this Mr. Dillon is one of the most eminent judges in the United States Circuit Court.

In 2 Gray, 339, where a bridge charter was granted for a bridge with draws thirty feet wide, and the Legislature undertook to require them to be made sixty feet wide afterwards, the Court held that the acceptance of the charter and the construction of the bridge was a contract between the corporation and the government, by the terms of which, as contained in the charter, both parties were equally bound; and that the Act of 1851 was ineffectual to compel the construction of a draw sixty feet wide.

Then a word from the case of the *Coast Line Railway v. the City of Savannah*, 30 Federal Reports, 646. The city of Savannah adopted an ordinance indicating a route for the railroad, with many terms and conditions; and, among others, the following clause: "In the event of the paving by the city of the whole or any portion of the streets used

by said railroad company, the portion of the track between the rails shall be paved and kept in good order and repair by the company at its own expense." And because the Legislature afterwards passed an Act authorizing the City of Savannah to require the railroad to pave not only between its tracks but three feet on each side, this Act to increase the width was held to be unconstitutional.

The fact is, we in Massachusetts have been so in the habit of doing everything about the street that the good public wanted to have us, that we have never raised any question of law, and we never want to. We want to live in peace with the people we have to deal with.

*Representative Kittredge.* You mean, if it takes the law to compel you to do it?

*Mr. Proctor.* Unless somebody comes up to the Legislature and wants to bleed us to death, and then we have to give them the law. This Act that I have just referred to was held to be unconstitutional by the United States Court, as impairing the obligation of contracts. The Court said that a reservation to the State of a right to withdraw the franchise of a company affects only matters derived from its act of incorporation; and the State cannot annihilate contracts made by the company.

*Representative Kittredge.* Then, Mr. Proctor, as I understand the legal position which you lay down as a guide for this Committee, it is this, or in effect, this: that it would be unnecessary for the Legislature to make any provision for any greater permanency for the existing charters of the horse railroads that you represent?

*Mr. Proctor.* I think it would be unnecessary to have any farther legislation to secure our rights. But so many wise young men have stated to the public in this room and elsewhere that we have not vested rights, and the question is so far raised already in the public mind that it has affected stocks and affected capital more or less already, and from the fact that that sort of mischief is done (although the legal position is all right) — from the fact that the poison has gone forth into the public mind which impairs and greatly

injures this property—if you make any legislation at all, I shall ask you, in amendments which I have prepared to the city bill, to put in such phrases as will leave no question for the period of time named in the bill. I think it is no more than just and fair that when a wrong, or what I call a wrong, has been done, it should be corrected. And, therefore, I shall ask for certain amendments in any bill that you may make, if you make any, which will put at an end that question in the public mind, both as it affects capital and other interests.

*Representative Kittredge.* Then, Mr. Proctor, on your view of the law, it would be a dangerous admission for the West End Railroad Company or the Boston & Lynn Railroad Company to accept any new charter or provision from the Legislature looking to any greater permanency in their charters or locations?

*Mr. Proctor.* Not the slightest. The best title I could have to any piece of land in Boston is not so good but that if any neighbor comes and says he has got any kind of a claim on it—although there is none at all—I should be exceedingly glad to get a release from him. I believe in quieting titles when there is no necessity for anything different; and I believe the unquietness that has been created should be corrected.

Mr. Harding cited two cases, 96 U. S. 499 and the 15th Wallace, 454, neither of which cases has anything to do with a franchise right in a street railway and only relates to a question of taxes, and that section was in the original charter which gave them their existence, and the question came up, whether there was a right of repeal, the same as there is in this State, and they did repeal the section or they decided that they had a right to. But we do not claim that in our original charter which gave us our existence the Legislature has not the power to repeal it. We are willing you should destroy us, but when you touch a contract that we have made after we came into existence, with another party, Commonwealth, mortgagee, lessee, contractee of any kind, then we say, Do not dare to lay your hand on that



contract, for it is a contract right; it is property as much as a horse bought and paid for.

I will read from these decisions that he cites. "Rights acquired by third parties and which have become vested under the charter in the legitimate exercise of its power stand upon a different footing"; and then again, in this, "Rights and interests acquired by the company not constituting a part of the contract of incorporation"—just like all rights that have nothing to do with the acts of incorporations,—rights acquired subsequently,—“stand upon a different footing,” but no such rights or interests are involved in those cases; therefore these decisions have nothing to do with this case whatever.

I pass on to the next point. My next point is that the bills proposed here—except the mayor's—by either impliedly giving power to revoke locations, or by impliedly saying that such power exists, do attempt to impair that contract by giving power to require money to be paid into the city treasury for a location which is only to take the place of an old location, the terms of which have been fully complied with by its possessor.

Under that I shall allude to the various bills very briefly. The Malden bill has the credit of being frank. It states right out what it means. It has all the disadvantages which I spoke of in opening—the disadvantage of interfering with vested rights and the disadvantage of having no appeal provided for. The city bill of last year which has been presented here belongs in the same category and needs no further comment. I think all I have said applies to it and shows that it is one that ought not to be reported.

Now, gentlemen, I must hasten on. Germane to this same question of the vested interest Mr. Richardson says what is given for a franchise right is no tax, but a payment,—just what I told you this morning, and I exactly agree with him. Whatever is given or agreed to be done, such as building the track in the street, at the time the location is made, is the consideration for the grant. It is a payment at that time, and it is not a tax. The tax comes in

later. The tax comes in in such provisions as he has provided in his opinion. He speaks of three licenses and rather implies that our franchise right is a license, but he will not differ with me in the law that a license granted may be revocable but a license granted and acted upon, with money spent on the strength of it, becomes a grant. It is no longer revocable. And then there is a license coupled with an interest that cannot be revoked by the grantor, but a license that is acted upon and a consideration paid and work done, the contract carried out—that license becomes a grant. Therefore it is totally immaterial whether you call the thing a grant or a license, but it has been sought to diminish the size of the right by calling it a license, but it does not amount to anything; whichever way you look at it, license and grant is the same thing if it is acted upon.

Another confusion that has crept in here a great many times: The word “city” means several things. One meaning is territory, another meaning is the people in the territory, another meaning is the municipal corporation, and that municipal corporation has two features in it. One is the owner of property—it owns the city hall; another is a legislative body; and the word “city” is used in these four different senses, and sometimes they are all confused in the bills.

Now, gentlemen, I want to come to a matter on those vested rights that is pretty important. I say it is conclusive, and so will you. Assume, if you please, that every street railroad in Massachusetts has made a mortgage and has mortgaged its franchise to somebody and got the money on it. Nobody doubts that that is a contract. The decision I have just read covers it exactly. That is a contract between the corporation and a third party, and even Mr. Harding’s decision expressly provides for that. Everybody who knows any law knows that that is a separate contract and has nothing to do with the government, and the Legislature has authorized these street railways to make the mortgages; they have sanctioned the mortgages; and, what is more than

that, gentlemen, let me read you what the Legislature says: "Said bonds shall be secured by a mortgage of a part or the whole of the railway property of such company and its equipments, franchise, and other property, real and personal." And do you suppose the Legislature is going to, or could, authorize its franchise to be mortgaged to a money-lender and as soon as they have got the money turn round and annihilate it? It is too absurd and preposterous to think of for a moment. When a horse railroad has mortgaged its franchise with the assent of the Legislature, that mortgage stands, and the mortgagee stands with control over that franchise right beyond which the power of the Legislature cannot go. I say you cannot proceed against the vested right as against the stockholder, but as against the mortgagees to whom the stockholders have sold the property with the express approbation of the Legislature for value received; they have got a title there is no power on Beacon Hill can disturb.

But, gentlemen, that is not all. Another subject: A large part of the rights in this State are held by lessees, who stand in a similar position to mortgagees, and those lessees got their title to this property under that authority, special authority and direction of the Legislature, of the Commonwealth. We own all our railroad from Revere to Vine Street in Charlestown by a lease, and that lease is made with the special authority of the Legislature, the Commonwealth, and we hold that title the same as the mortgagees hold their title. It has been sold to us, and we have a right to it.

I come to the next question, and that is that we own a vested right in five miles over the Salem turnpike, from Vine Street in Charlestown to Swampscott, that we bought of the Salem turnpike and paid for, and we own it as any man owns a right that he has bought and paid for.

*Representative Quincy.* Bought of the Salem turnpike corporation?

*Mr. Proctor.* Yes; and the Legislature in our charter specially authorized us to buy it, and we bought it and paid

for it, and we own it, and no man will dare to question that we own that as much as any man owns his house.

I will read this decision in *Lynn & Boston Railroad Company v. Lowell Railroad Corporation*, 114 Mass. 92. The Court says: "The plaintiffs rely upon the proviso introduced by the last-named act, which is as follows: 'Provided that said highway shall be subject to all the leasehold and chartered rights and liabilities of the Lynn & Boston and the Boston & Chelsea railroad corporations.'"

We claimed that we had such a right in the street that the Boston & Lowell Railroad could not get across Chelsea Bridge, and what we were driving at was to prevent their crossing there, but the Court said we could not, but we bought and paid for a concurrent right with the public in that street, and we own it as much as any man owns his house, and there is no question about that; and you will see the importance of this in another connection where somebody — Brother Harding, I think it is — wants to make a charge based on the gross income. Well, I should like to see him make a charge on our income on the Salem turnpike right. Whatever that five miles earns is ours, and there is no power on earth can interfere with it; but I cannot tell how much of our earnings comes from that part of our road, nor can anybody else, and if you are going to base — I do not suppose you will, but I want you to see the folly of it — if you are going to base any bill on the gross earnings, you will have hard work to have it go through, and I think it would be unconstitutional.

Now these gentlemen come up here and say, "More money, more money," and they say, "You have got no contract, and we will have more money because you have no contract;" and when we tell them we will discontinue running through the streets they say, "There is a contract. You have got to run your cars." If we should stop running our cars, there would be such a howl among the people that we could not live.

*Representative Kittredge.* Why would not that be a good way to test this whole question?



*Mr. Proctor.* We should not dare to. No; in the din that would be raised I would lose what little power of hearing I have left now, and that is none too much.

Now, gentlemen, I come to the second point. I was very glad to hear the mayor say that the board of aldermen of this year never would be guilty of revoking a right for the sake of getting some money. I want you all to remember it. I do not believe any board of aldermen would do it.

Now I was saying to you that I had threshed this whole subject over for ten years, but it never has come up with the poison quite so virulent as it is this year. Last year we brought up the taxpayers before the Committee, and we brought up a strong petition from the Laborers' League and a petition from the employees of our road, and we brought these people all up here, and I should have brought them before this Committee only we never would have got through if we brought them this year; but last year they were here, and every one of them took the ground that they did not want the bill, and the mayor of the city of Lynn was really ashamed of it before he got through. That was a special provision for the city of Lynn alone.

Now I will hasten on to what is the second point in this brief. Irrespective of what the law is, all grants and locations and the acceptance of them, and burying capital in the street, have been made upon the understanding that the location was permanent, the terms thereof being complied with. It is not right for the Commonwealth to induce her children to pay their money for her grants by burying the same in the street, when she knew they supposed that the grant was permanent; and then the next year, or at any time, say to them, "I shall withdraw the grant unless you pay more money to some city treasury." This proposition is not honorable, and no State can afford to entertain it.

My second proposition, then, is that, whatever the law may be, no Legislature, under the circumstances existing here, with which you are all acquainted, can afford to put itself in the position of committing a breach of faith. As to new locations it is totally different. As to old ones

we have done things upon an understanding and an agreement, and the Legislature cannot afford to go back on it, as the phrase is. If they wish to change their policy and in the future make any change that they please, they have a legal right to do it, and I make no complaint of that. I shall hereafter, however, come to the question of public policy even upon that. The history of our road, in brief, is that it began in 1859 and it did not pay a dividend for years, unless it was the first year, so that the men who built it could shoulder the stock off on to somebody else, and for twenty years thereafter it paid no dividend, and only the last third of the time has it paid any. We earned some money there during that twenty years and I have been working there for the public, nothing else, for twenty-five years until recently, and what we might have declared in a dividend we laid up. Where? Buried it where the public would get the benefit of it, because we expected if we built up the road and suited the people we would make something out of it. Self-interest is the mainspring of human action, but at the same time, when you come to horse-railroading, the only self-interest you can have is such as will lead you to please your patrons, and we have, instead of putting money in our pockets, which we have a right to, we have put it into the plant and the public have got the benefit of it, and we have been laying up treasures where we supposed it might do us some good when our hair is gray, and the blood runs more slowly, and now that time has come, some people think it honorable to come and take it from us, and they have the audacity to come here to this Legislature and to ask the power of the Legislature to financially destroy us before the altar in the very temple of justice. It is wrong, and every man knows it as soon as he thinks of it, to destroy a man's treasure that he has laid up for his life without any more warrant for it than is shown here. I, for one, pity any man who will pursue such a course, and I hope that light may fall upon all such, that they may see justice truly and fairly.

Now what we want is to have the old Commonwealth treat all her children honorably. She always has done it,

and I do not believe there is a man on this Committee who will pass any vote to have anything else done with these companies that are serving the public constantly. What we want is stability, honor, confidence.

The day will come when every one of the cities coming here will be ashamed of doing the act that they have done. It is very easy when they have manufactured a sentiment and a current that runs that way, but you wait until the employees begin to be pinched and you wait until the passengers begin to be pinched and they begin to feel the wrong of this, and you will find the current running the other way quite as hard and a good deal harder than it is now this way, and you will see political crafts that are trying to catch the wind dashed on the rocks.

I come now to the third division of my paper. It is against public policy to require any more burdensome terms, when locations (old or new) are granted to street railway companies. They already pay as much and bear as heavy burdens for what they get as such companies, on an average, pay and bear in other States for what they get; and very few, if any, can afford to bear any greater burdens.

It may be legal to change this policy which has been established and running for forty years, to make no money charge when the location is granted but only place burdens upon them. This has been the uniform, established custom in this State and is supported by London, which has the wisdom of the world, and has done it for a long time and ought to know what public interest requires, but I say it is not wise to change it and I would draw the line just where it always has been drawn. Give the cities and towns whatever power you have a mind to to regulate the use of the streets by the railroads in conjunction and concurrence with other uses. Make them pay all that they fairly can or ought to pay in fair dealing with this sort of a public corporation. Make them pay what is provided in the mayor's bill, if you choose, because that leaves no chance for any scandals or troubles; but do not cross that line. Do not let any governmental power, any political power, have the handling

of anything pertaining to money. It is a maxim, which you all well know, that that government governs best that governs least and keeps the peace and preserves property, and, in accordance with that maxim, do not give the city anything more to do with money, especially in the way suggested here, than you can help. There are a thousand ways in which you can burden these poor corporations, but that would be unwise, although it would be a great deal more in accordance with the established policy of this Commonwealth than to proceed in this kind of way, for I think this comes the nearest to legalized robbery, in my point of view, of anything that I ever heard of; but if you want to place any more burden upon them, do it within the line which has been heretofore followed, in the various ways which the statute suggests and already provides — but I tell you they cannot afford to do any more, not even the West End.

There is a six per cent. waste every year, there is every now and then an epizootic, which is sufficient to kill a dividend; there are your damages; and, by the way, I have touched on a subject that is very fruitful. These damage cases are very expensive. There is not a case where a woman gets her little finger injured but runners are out after her to get her case for certain offices.

Then there is snow — very heavy this year; then there is the grain crop — oats 64 cents instead of 33.

*Representative Kittredge.* Sixty-nine to-day.

*Mr. Proctor.* Higher and higher. I simply know it drains the last dollar that a horse railroad takes in. Then there are hard times every now and then, when there is no money to pay for riding; then the fares are reduced to the very lowest notch, because it is fashionable to have it a nickel. Then there are long lines through very sparsely settled districts.

There is no earthly reason for limiting it. These corporations are entirely in the hands of the public, and you can get out of them all you want without crushing them in the dust. What is the consequence of putting on any



limitation? You have got to go to work and have a sinking fund, and sinking funds are a curse; somebody will steal them; let a man own his house, not let somebody else own it. It simplifies the process. Give us honest, square dealing.

*Representative Quincy.* You are entirely satisfied with the legal status of locations at present?

*Mr. Proctor.* Yes, sir; I am satisfied, with this exception. There has been such a misstatement of the facts which I mentioned this morning, — to wit, that we do not pay anything, which is not true; that we pay less than other people, which is not true when you take everything into consideration; and that we are able to pay more, which is not true, — while such things have gone forth into this community through pamphlets or something else and poisoned the public ear, and when reports have gone forth since this hearing commenced, which have reached the capitalist's ear, and the capitalist is made cautious so that he will not invest in this kind of stocks, a wrong has been committed, and this Committee ought to see, in all fairness (if they think it is right to make any bill), they ought to see that this bill corrects all this wrong, and shows to the public that that right is vested and secure; and I have made an amendment which I shall submit to you, providing for permanence, so that this wrong will be righted. If these additional burdens are put on under this new policy, then wages, fares, service, extension, all improvements must change.

This new policy says it is going to put more money into the treasury of the city of Boston, but it ought not to come from the horse railroads. It ought to come from the taxpayers. The taxpayers are all rich, or most of them are, and the passengers of the horse railroads are poor, but the money that goes into the city treasury, as I am informed, is not used in the best manner. I will say, and I want you all to bear this in mind, because it bears on the question of policy, that every dollar that you take off of fares the passenger gets a hundred cents for. Every dollar that goes into the city treasury — how much of it does the public

get? Each one can decide for himself. Now I say, Preserve the present policy, which has been to reduce fares as low as possible, give the best service, and then every benefit which comes from the horse railroad remains right where it ought to, in the passengers' pocket and comfort. Change the whole policy and cramp the passengers with miserable service, like Baltimore, put the money into the treasury of the city, and you injure the community.

I ask you in great earnestness that you will draw the line where it always has been. Give the city the control it has had, but do not give it any money; let it get that from the taxpayers. That is best for all; and do not cross that line if you wish to avoid troubles.

Now I say the true policy of the State is to grant a permanent right; capital buried in the street (for the right to place the iron and the sleepers takes the place of the capital); the franchise tax, low fares, best service, large extensions,—and, by the way, I want to say one word about that subject of extensions in addition to what Mr. Whitney said. I have owned a large lot of land out in the country as trustee, and I have sold it and I know about the benefit of railroads being extended out and mechanics living out there. These men buy these small lots and build on the summits of the hills, on the sunny slopes and in the valleys where they can listen to the music of the brooks and the songs of the birds, and when they do that, you have got healthy citizens. You compress them into a small space in the city and they are like apples in a barrel and they will rot. Those are the two extremes. Which policy will you adopt? I have had occasion in the Mechanics' Institute to address nearly a thousand doctors of Massachusetts, and I said to them, as I say to you, that the race is depreciating and every aurist and dentist and physician in the land will tell you that the constitution of some Americans is depreciating.

Greece was the most refined country that the world ever saw, in culture, finish, manners, and all that sort of thing, and while this was her condition luxury came in and her

blood was poisoned; and Rome went the same way. Rome conquered Greece, but Greece conquered Rome by her luxurious habits and Rome went down with all her gladiatorial power, and it is the same thing that is going on to-day, and there is one man on this Committee that I know knows it. Teeth are becoming like chalk and the ears cannot hear, and I am one of the unfortunates myself, and the people have less vigor except in some of the new races that have come in, who have not got Americanized yet, and whose nervous temperament has not been impaired, and I have the pleasure of excepting some of them from the class I have described.

Now, I say, if you want to give health to old Massachusetts and preserve the pristine vigor which characterized her in the days of the Puritan, extend out into the country as far as you can, and grant every facility that you can, instead of cutting off these arms and crowding the people into the centre of the cities, that they may decay still faster than they are decaying now. I shall leave to you the policy, now, as to the permanent rights, capital buried, franchise tax, low fares, best service, large extensions, care of streets, removing snow. All those things are now done by the corporations, and they are all that they can afford to do, and so I say that I know from twenty-five years' experience that what I am saying is the truth.

Now, what do these gentlemen want here? They want a new policy; they want more consideration paid for the locations. We cannot stand it. They want more taxes, and they want a limited tenure.

All this movement you have before you here tends to city ownership of the whole business. I have not the slightest objection to having the cities or towns through which we pass take our railroads at a fair valuation, and I have nothing more to do with it. I do not want this eternal fuss and squabbling.

*Representative Rosnosky.* Do you think it would be in the public interest to have that done?

*Mr. Proctor.* That is just what I was coming to. This is

the entering wedge leading to it. The efforts of this set of persons here is going to end in the cities running all the horse railroads, and when that comes then God save the Commonwealth of Massachusetts! A greater abomination could not be conceived of.

*Representative Quincy.* Horse-railroad people would be willing to sell out to the city?

*Mr. Proctor.* Horse-railroad people are ready to sell out at any time. They have had about enough of this, as far as I know anything about them. We are ready to sell ours out. If the cities want them, they can have them for a fair valuation by experts. These eternal attacks—it is attacks by damage cases, and attacks by people who say you have got no rights anywhere, and attacks by this and attacks by that; and if we are going to have those kinds of attacks, and people are going to ask the old Commonwealth, the mother of us all, to destroy us, I should rather die than to live to see such a result—to see that the Commonwealth's honor is to be degraded so low. I hope not to live to see that day.

(On motion, the hearing was adjourned to Monday, April 6, at 10 A.M.)

*The Chairman.* The continued hearing upon the subject of street franchises is now in order. Mr. Proctor will proceed with his argument.

*Mr. Proctor.* Mr. Chairman and Gentlemen,—So far we have had a plain talk, a mutual talk, searching for what is truth, to find out what is best for all concerned, simply that and nothing more. I have shown you how the petitioners' move is against the law, is against good faith, is against public policy for forty years, against health and harmony, and I have suggested the enormity of the city being made its own judge without limit of how much money it shall take from one corporation treasury to put into another.

In answer to Mr. Kittredge's question the other day which was passed, as to getting more money out of the corporation for the city by enlarging the street repairs, in my judgment they are paying all that is now reasonable. Their property



is taxed and that goes towards paying for street repairs, and then they take care of a large part of the street, and that is more than is reasonable already, and you cannot get any more. If you undertake to get any more under the guise of repairs of the streets, in my judgment it will be illegal because it will be an indirect attempt to get money which the Court of Appeals decision which I read here said was illegal and void. These indirect methods are just as bad as the direct ones, and to attempt to put a larger charge than what is reasonable on the repairs of streets for the use that they make of them would be one of those indirect methods which would be as void as the direct.

Brother Bailey asked me Friday, gentlemen, if I would comment on the Marginal Railroad. Chief Justice Gray says, "Upon the absolute repeal of a charter by the Legislature, acting within the limits of its constitutional authority, the corporation ceases to exist, and no judgment can afterwards be rendered against it in an action at law. But such repeal does not impair the obligation of contracts made by the corporation with other parties during its existence, or prevent its creditors or stockholders from asserting their rights against its property in a court of chancery, in accordance with the reasonable regulations of the Legislature, or with the general principles and practice in equity."

This cautious opinion of the Court shows you, Mr. Chairman, that the law stands the same as to creditors and stockholders that it does as to mortgages when you annihilate the charter of a corporation. The receiver is bound to take the franchise right, the contract rights, whatever they are, and with whomsoever made, and dispose of them according to the law, and give the proceeds of the sale to the stockholders, to the creditors and the mortgagees; and there is not a lawyer in Boston that will raise any question about a mortgagee's right to the franchise which has been mortgaged to it with the consent of the Legislature. In short, the case to which I have just referred exactly supports the doctrine which I stated Friday, that the contract rights of the corporation are preserved notwithstanding the corporation's exist-

ence is ended, and that by a receivership the receiver can sell its franchise rights and dispose of the proceeds to the stockholders, creditors, mortgagees, and that they all stand on the same legal basis as to those contract rights, whether the contract is with third parties or is a contract between the corporation and the Commonwealth. And I want you to remember, what I forgot to say Friday, that all the locations of my road have been confirmed by the Legislature by distinct act, chapter 152 of the Acts of 1881, which shows you what the Legislature's opinion is as well as what is the Court's opinion, that this contract is made by the Legislature.

Now, gentlemen, I want to ask your pardon for touching upon that subject of good faith, because it seems to me impossible that this Legislature, the mother of these creatures created by it, could ever exercise any bad faith against them, and my excuse is simply that these men who have come here advocating these positions have forced me to bring this question to the front; and, gentlemen, when one of your Committee asks me if a board of aldermen could not, by concealing its reason for its action, get a judgment of revocation against a corporation and so hold it, implying that a board of aldermen might do such a thing, and thereby get a grip that it ought not to get, and encourage a practice that would be almost too sharp for the Police Court of Boston, I say, when such a thing is suggested here, is it not about time for you to look out for the honor of the Commonwealth upon the question of whether you will leave the matter to any board of aldermen who might do such a thing? I do not believe they would do it, and when it is suggested by high authority as a way in which indirectly they can get a bleeding process going, it is time for me to call your attention to the subject. This attempt to feel all around everywhere to find a place where you can tap a corporation as you would a sugar tree, to get the sap out of it—as the city looks around at all these corporations to see how it can get money out of them, reminds me of the advice that a father gave his son who was going out into the world, “Get money! Get it honestly, if you can, but get it.”

Now, gentlemen, we have attacks on the right hand and attacks on the left, attacks in front and attacks in the rear, and four petitions to Committees attacking us all at one time in this Legislature. What I ask of you, gentlemen, is, whatever you do, put a stop to this attacking which depreciates property, and depreciates property that is invested where it is doing more good to the people of the Commonwealth than any other property in the land, and you know it and the people know it. I have in my mind a street railway corporation that was organized only last year and it has put \$100,000 in the streets in laying its track, and if the position of these revolutionists is correct, that property is not worth a dollar; it won't pay for taking up, and the rest of that property cannot pay their debts. That illustrates to you the wrongness of this position, a corporation not in existence a year, and its property gone out of sight; make that right permanent with what they have buried in the street, and their capital is back and alive.

*The Chairman.* Mr. Proctor, do you state to us as an expert or upon figures that the tracks and roadbed connections of a street railway after they have been laid new will not pay for taking up?

*Mr. Proctor.* After it has been used any considerable time. I would not say that exactly new when taken right up again, but old iron will sell in the market like an old bonnet. The sleepers are certainly good for nothing when down, and of course the longer they have been down the more absolutely worthless they are, but the expense of taking up, the cost of labor, is very much in putting the street back in repair. If you sold the second-hand railroad iron, it would not bring enough, as I have been told by experts and judging from my experience of twenty-five years.

*The Chairman.* What would be the fact in the case of a paved street, if you had to repair the pavement in addition to the ordinary macadamized road.

*Mr. Proctor.* It would only make it worse.

*The Chairman.* Would it leave anything for the railway?



*Mr. Proctor.* No, sir; I do not think it will leave anything. I give you that illustration to show you the utter absurdity of the position; that is to say, the proposition which my friend George Fred Williams stated, that you could have plenty of capital to put in the street if you should adopt his principle. Why, it is too absurd to think of it.

Again, gentlemen, this is a case worse than Grangerism in the West; but I want to call your attention to Nebraska, where they have passed a law cutting down the freight twenty per cent., and it has raised such a howl among the employees of steam railroads and among the people of the State who are dependent upon steam railroads, and they have sent so many petitions to the governor that the governor has declined to sign the bill, and I understand has vetoed it. I merely state to you that that is just what will take place here.

Follow this course that is marked out here for you, and you will put on the horse railways the burden of enlightening their employees and their passengers, in just the way that you have been informed on the subject here so that they will understand it, and they will take out of the public mind the poison that has been put in it by Document No. 144. The railroads have got to overcome the wrong which has been done by wrong statements or half-statements, and we have got to spend an immense amount of money to correct that and educate the people on the subject, or else you have got to put into some bill here something that will give us stability and confidence.

Now, gentlemen, I want to say that you cannot compare New York and Massachusetts in this matter. I have referred to it before, but it is intensely important; it touches the hinge of this whole matter. Short lines through thickly settled portions of a city earn say \$100; \$50 goes to expense, 20 per cent. to dividends, and 30 to the passengers or the city. In New York it goes to the city. In Massachusetts with long lines sparsely settled, you take in a hundred dollars, and the expense of running the road would



be ninety, and the other ten might pay two or three per cent. dividends. Another difference is this : more than half of our companies have nothing left for anybody after paying expenses, and there is nothing left for the stockholders' dividends or the city or the passengers. Now, just bear that little illustration in mind, and do not forget it. The policy here has been permanent grant, capital buried, franchise tax, low fares, best service, large extensions, health and harmony, care of the street, damages paid, snow removed, and such things, and that takes all there is; and when gentlemen come here and flippantly tell you to give the city a chance to bleed them, what is it coming from? Where is the bleeding coming from, with nothing in the treasury? And in companies that barely pay a dividend (and that covers all the rest), when you have your expenses taken out and your small dividend, there is nothing left, and where is the bleeding coming from? You know, and everybody knows, that the expenses must be paid first, and a reasonable dividend comes next; and it is idle to open the way for the city to take anything where there is nothing to take.

Gentlemen, I just now succinctly stated to you the old policy. I come now to say the new policy is the same as the old, with two elements added, short lines and something for the city (although the petitioners only name one, to wit, to pay the city something), and I have shown you there is nothing from which to pay them. If you want to make it like New York or any of the other large cities where something is paid, you have got to add the second element, to wit, bring all the out-of-town people into the centre, and shorten the lines and make them two miles instead of six miles long. By doing that, you will wipe out eighteen millions of property in the companies. There is no possibility of its being done and it is too absurd to be mentioned. And you will be confronted with the proposition of moving all the country houses into the city, which the people will not allow anybody to do, for they are the sovereigns; so that the second element in making Boston like New York, or like any place where there is money paid to the city, cannot be

brought about ; it is physically impossible, and it would be simply wickedness in the extreme to put in one of the elements without the other, and it would be as physically impossible to comply with the one element of paying money into the city unless you bring in the other. If you want to have things alike all over the world in this system, just go to New York and make one change and you will accomplish it : reduce the fare on their greatest route from North River to East River from five cents to three. Where you have got \$100 now, you will then have reduced those receipts to \$60, and have \$50 for expense and \$10 left for dividends ; but when you come to Boston and try to make it like New York, it is physically impossible. Gentlemen, they told us here that there was a principle at stake when you pressed them hard on the facts and law, but I tell you it is no principle at all, but a policy, and the policy is different in one place as the circumstances are different from what they are in the other. So you see, gentlemen, there is no question of principle, for a principle can be applied everywhere. It is simply a question of policy ; and when a man begins to talk to me about a principle in the matter, and wants a thing done because there is a principle at stake, I begin to suspect him. He is like a man that comes to me and wants to talk business, and begins to talk about religion, and then I begin to look out. You want to come down to what is the practical effect of what the man is saying, and then you will find out what is wanted. These theories and so-called principles are very mischievous, and oftentimes destructive of the good of the Commonwealth. Why, gentlemen, you might just as well say because one woman wears a pink ribbon every other woman shall wear a pink ribbon. Now, you know here is no principle about that, for the New York brunette can wear a pink ribbon and bring the complexion out stronger, but the Boston girl with a delicate complexion puts on a pink ribbon and she is as pale as death. It is just so with these horse-railway matters. You can put on the pink ribbon in New York and make the companies pay something into the State treasury, but if you put on the

pink ribbon in Boston it is death to the corporation that you put it on to. Talk about principle! Is it not about time to suspect the man that talks about the question of principle, whether money shall be paid into the treasury of the State or not, not his honesty, but his prudence, his wisdom, or his want of it, or his want of knowledge, which is most likely always all the trouble in the matter. Now, I say there is no principle in this matter; it is a matter of policy, of prudence, of wisdom; no principle about it at all.

Every dog that has a taste of sheep's blood will follow it until it has got its last drop, and he will follow every other sheep that is within its reach or sight, and for that reason I say, in all discretion and judgment, stay the hand that shall seek to destroy, however innocently wrong they may be, but stay it, and save the comfort of the people which they enjoy now. I would bring the public opinion to bear on the corporation in every possible way, but alluding to the municipal corporations, such as they are, I want to say nothing more about them than I find in that celebrated Document No. 144, page 22, namely: "It must be admitted that the authorities here are less exposed to the vicissitudes of American municipalities, and the scrupulous retention of experienced men in office has greatly aided in establishing the present creditable condition of the municipal administration of Berlin." Now, supposing the city government is more or less better or worse, they may legislate as much as they have a mind to as to burdens, but authorizing them to act as judges of how much money they shall take out of A's pocket to put into B's is like the arsenic of which you have heard something in the Legislature this winter; it is like what Judge Joel Parker said at the last Constitutional Convention in a speech. He said, "This is in some respects a most excellent Constitution. It is a good deal like a most excellent loaf of bread, but it has got altogether too much arsenic in it; it has spoiled the whole."

*The Chairman.* Now, Mr. Proctor, one question is to determine the reasonableness of an excise law. If the Legislature affirms that it is reasonable, recites that it is reasonable, adjudicates that it is reasonable, is not that conclusive?

*Mr. Proctor.* It cannot do anything of the kind. The Legislature was not made for adjudicating. The Legislature is made for enacting laws, and another branch is made for deciding whether they are law or not law.

The Court says in 133 Mass., page 161, for example, that taxing the premiums on life insurance, non-resident life insurance, in the way that they were taxed, is reasonable. That is an illustration of how the Court passes upon it, but there was no double taxation. If you introduced double taxation, the Supreme Court would say it is unreasonable. Now, what I want to say to you is that if the Legislature in its acts says a thing is reasonable, that does not make it so. It is for the Court to say whether it is reasonable or not when the case comes up under it. That is my position; but, gentlemen, when I was interrupted I was talking about letting the city legislate or act as judge in taking money from A and paying it to B, that it was like arsenic, and I say that in the propositions that have been introduced here, there is more arsenic in that loaf; and that is in making the city the judge of how much they shall take, and I submit that those two kinds of arsenic are sufficient to doom the whole mass in this direction.

But, gentlemen, there is another little feature I will allude to briefly. The city of Boston looks very much like a spendthrift youth. The Legislature has put a limit on the amount it shall spend.

*Representative Wilson.* No more than they have on other cities.

*Mr. Proctor.* And other cities. It has put it on just as a father puts it on a son, and won't pay more money than he ought to, and when he puts that limit on, he means that no more dollars shall be spent than such a limit will yield, and he means his son shall have no more. Now, gentlemen, what does a son of that kind do when he has a limit put on him? He goes round to his father's friends, and by representations to them he gets money out of all of them, and then they call upon the father to pay, and he comes up to his father and says, "O father, you pay them. I will bleed them



as much as I can, and you pay them." Now that is about the way the cities of the Commonwealth come here. They had a limit put on them by their old mother, the Commonwealth, and she said, "You shall not spend any more;" and now they come looking round into every corner to see how they can get a chance to bleed a special class of corporations; they have been looking round to the steam railroads to see how they can bleed those, just like a spendthrift boy, and they want to jump over the bars; and I say that the old Commonwealth will say to these people who are trying to play the spendthrift, "Go home and live within your means, and be honest, and if you want any more, earn it like a man;" and I say to those people who come here, "Stand within your limit like a man; comply with it. It is the best thing for you, for the city, for the Commonwealth, for the people, for everybody; but if you want any more, earn it honestly and change your limit of taxation."

The only manly way to do is to determine what money these cities ought to be allowed to spend, and tax the property directly. Let the rich taxpayers pay what the treasury fairly needs and what is warrantable for them to have, instead of trying to get it out of some of the father's friends (perhaps they will never get their pay), instead of trying to take it out of the poor passengers who ride in the horse-cars. I say the policy which is advocated here is all wrong, and the moment you start over that line that I have drawn, a line which has been established for forty years, you have given these cities a taste of blood, and they never will stop within any reasonable limits. I do not believe there is a man on this Committee but what would admit that proposition.

Now, one gentleman on this Committee asked my friend, George Fred Williams, if he thought the people would approve of this movement. I am somewhat amazed that he should ask what people would say about a thing that they know no more about than they do about watchmaking. If he had asked them if this Document No. 144 had created such an impression, that would have been a fair

question, but if you ask what the people with an intelligent view of the subject would say, his answer would be, "They would say, No."

Now, gentlemen, only very briefly further. It has been asked here that a commission should weigh this subject carefully. If the governor will appoint a good business man, who has nothing to do with railroads, and a first-class, level-headed, judicial lawyer, and a man who has spent his life in horse railroads and knows all about the subject, that commission will grind out a policy and give the reasons for it so that anybody who runs may read, and that will produce the best result that you can reach. There is no occasion here for haste. You are starting a ball that will work much ruin, in my judgment, if you open the door even for money considerations in new locations. I would amend the city's bill so you may prescribe the terms and conditions, excluding money. Open that door and you are gone into "wandering mazes lost."

*Senator West.* It is the same thing.

*Mr. Proctor.* It is not the same thing. Tax the people for what the old Commonwealth will allow cities to spend, and they cannot have any more. I have no doubt if I were in the city government I would want more money, and I would try to get it, but if I spoke to them, I should say, "The only way to get it is to come to the Legislature and get the limit extended to have more money;" and I say that it is a dangerous policy to come here and ask to have it gotten indirectly out of any special class, and it is wrong for them to spend any more than the Commonwealth sees fit to allow them to spend. They are a mere creature of the Commonwealth. A man in the city government thinks he has got a sovereignty in the city government, but it is so no more than a horse railway corporation; it is an agent of the people, a form of agency through which business is done. Grattan once said, "Do not dare to lay your hands on the Constitution;" and what I say to you is, Do not dare to let a city government cross that line and begin to take money. You never will hear the last of the trouble which

will come from it, if you move in that direction one dollar's worth.

The present tax by the Legislature is a franchise tax, — see 99 Mass. 146, — there is no doubt about the law. They cannot tax that franchise again; it would be double taxation. In the case of *Sandwich Glass Company v. Boston*, 4 Metcalf, top of page 186, it says, "Double taxation, being apparently unjust and unequal, will never be presumed to have been within the intention of the Legislature." Again, the Courts say, in *Lowell v. County Commissioners*, 146 Mass. 409, that double taxation is an injustice; and the Public Statutes, chapter 13, section 41, provide a remedy against double taxation when the value of real estate is made too small by the state commissioner. There it is all in a nutshell, clear and unmistakable. First the injustice; hence it is unreasonable, and so within the Constitution. No Massachusetts corporation was ever in this State taxed doubly.

Now, Mr. Richardson cites, in his brief, two cases, — the foundry case and another, — in which he implies that that argues toward double taxation. It does not. The real estate was taxed. The stockholders paid their tax on the stock in the places where they lived, and no one party was taxed twice; and there is not a case in the Commonwealth, there is not a particle of a case in chapter 13 of the statutes where there has been any double taxation, but it has been most specially guarded against in every single case; no one party is taxed twice. Now, for your information, in drawing your bill on the tax side of it you may tax the franchise as much as you like, if reasonable, but tax it twice and it won't stand. Now, Mr. Richardson suggests that chapter 13, section 60, that general clause, looked as if there could be double taxation, but, gentlemen, he did not go back to see where that act came from. It comes from a statute of 1865, chapter 283, section 18, and there is a proviso that a tax to be paid in one case on premiums received here was not to be computed on premiums for insurance in other States, so that the very act which he cites to show double taxation shows that the Legislature was especially careful to avoid



it even where the taxed premium was in another State. I want you to bear in mind that invariably in every case the Legislature has been always specially careful to avoid anything that looked like double taxation.

*Mr. Bailey.* That was because they thought it was rather hard, not because they thought they could not.

*Mr. Proctor.* I mean to say I don't suppose the Commonwealth is going to do anything that is wrong. I do not care how much power they have; I do not want to contest their power; but I appeal to them to do what I know they will do, simply what has always been honorable; and if the Commonwealth, which has lasted two hundred years, has never varied from one principle of taxing once the same thing to the same parties, and not twice, is it not rather too late a day to begin to talk about taxing the same thing twice to the same parties? It is too late, too wrong to be mentioned for one moment.

Brother Richardson says, make a new class of street railways and tax them. I have not the slightest objection to that, but if you take them out of the stock-list class and put them into another class by themselves, you cannot keep them in the stock-list class, and you all know that at a glance; they can be taxed but once. That is just what you will find in every line and letter of chapter 13 to-day. I have no objection to making a distinct class if you want to, but you cannot keep them in the stock list also.

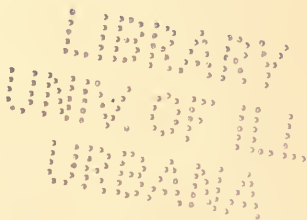
*Representative Quincy.* What do you mean by a distinct class?

*Mr. Proctor.* Why, to-day all companies that have stock are taxed, or nearly all are taxed, on the valuation of their stock, and all corporations, such as life insurance, that have no stock, are put in a class by themselves because they cannot be reached the other way; they are exceptions. Now, Mr. Richardson says you can make a new class of those street railways. I do not think it would be right or proper to do so. It would make an invidious distinction. But they have the power, and if they did put them in a special class they cannot keep them in the other class too;



there is not the slightest question about it. Now whether this proposition, which has been presented here to get some money for the city is legal or not, I can see illegality; but I think there is this possibility, that even if there are legal objections to it, the corporations, if you give them the security that the good of the citizens require as well as themselves, stability, confidence, and honor, on that basis they may accept and waive any objection there is; and I have provided for those elements in the amendments to the bill. Remember that we do not accept the Boston bill. I have given you the reasons why I think it is wrong on the ground of public policy and wrong for other reasons; but if you are going to adopt this or anything like it, then certainly we should have these amendments.

[Mr. Proctor explained these amendments and submitted them in a printed bill.]



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